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MBJ

## TEXAS STATE BOARD OF PHARMACY

RQ-408

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Opinion Committee

June 4, 1992

Dan Morales  
Attorney General of Texas  
Price Daniel Sr. Building, 7th Floor  
Austin, Texas 78701

Attention: Madeline Johnson  
Chairman, Opinions Committee

Dear General Morales:

The Texas State Board of Pharmacy (TSBP) is requesting your opinion regarding the functions of the State Office of Administrative Hearings (SOAH). The SOAH was created by Senate Bill 884 (SB 884), which was enacted by the 72nd Texas Legislature and became effective September 1, 1991. Specifically, our question is: If a majority of the Board attends a licensee disciplinary hearing [with an administrative law judge (ALJ) from SOAH presiding], may the Board members at that time make findings of facts, conclusions of law, and vote on a disciplinary sanction, without receiving a proposal for decision from the ALJ?

A reading of SB 884, with the relevant provisions of the Texas Administrative Procedure and Texas Register Act (APTRA), appears to give the Board this option. Section 3(b) of SB 884 states that an administrative law judge may:

- (1) administer oaths;
- (2) take testimony;
- (3) rule on questions of evidence;
- (4) issue orders relating to discovery and other hearings or prehearing matters, including orders imposing sanctions that the agency that the contested case is before may impose, subject to review by the agency; and
- (5) issue proposals for decision that include findings of fact and conclusions of law. (emphasis added)

This language is merely permissive, not mandatory. Therefore, it appears that SB 884 does not require the issuance of a proposal for decision.

Dan Morales  
June 4, 1992  
Page 2

Section 27 of the Texas Pharmacy Act, Tex. Rev. Civ. Stat. Ann. art. 4542a-1 (Vernon Supp. 1992), states that any disciplinary action taken by the Board under Section 26 of the Pharmacy Act is governed by APTRA as well as the rules of practice and procedure before the Board. Section 15 of APTRA states:

If in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case or read the record, the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served on the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs to the officials who are to render the decision. (emphasis added)

This section requires a proposal for decision only if the Board did not hear the case or read the record. Under both statutes, the Board of Pharmacy may apparently take disciplinary action without a proposal for decision, as long as a majority of the Board attends the hearing and hears the evidence.

Section 13(j) of APTRA provides that the ALJ who conducts the hearing shall consider any applicable agency rules or policies in conducting the hearing, but may not be supervised by the agency. APTRA also provides that an agency may change a finding of fact or conclusion of law made by the ALJ, or vacate or modify an order issued by the ALJ, only for reasons of policy and must state in writing the reason and legal basis for the change. However, APTRA does not explicitly require that the ALJ issue a proposal for decision.

It should be noted that Sections 155.15 and 155.51 of the Rules of Procedure for the State Office of Administrative Hearings contain the following mandatory language:

§155.15. Powers and Duties of Judges

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- (b) The judge shall have the power to regulate the course of the hearing and the conduct of the parties and authorized representative, including the power to:

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- (9) issue proposals for decision pursuant to Section 15 of APTRA.  
(emphasis added)

§155.51. Proposal for Decision

- (a) A judge shall prepare a proposal for decision which shall contain:
  - (1) findings of fact and conclusions of law, separately stated; and
  - (2) if appropriate, a proposed order.
- (b) The judge shall submit the proposal for decision to the final decision maker with a copy to each party. (emphasis added)

This mandatory language, however, is modified by Section 155.5, which states:

§155.5. General

- (a) Administrative hearings in contested cases conducted by the Office shall be conducted in accordance with APTRA and with the applicable law and rules of the agency for which the hearing is conducted.
- (b) If there is any conflict between these rules and rules of the agency for which a hearing is being conducted the rules of the agency control. (emphasis added)

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The Texas Pharmacy Rules (22 T.A.C., Part 15) provide as follows:

§281.5. Hearings.

A hearing shall be held prior to the board entering any final order or decision if required by law or this chapter. In other cases, the board may at its discretion hold a hearing prior to entering a final order. Any party individually or specifically aggrieved by a final order or ruling entered without hearing may, within 20 days from notice or knowledge of such order or ruling demand hearing, and the same shall be granted if required by law. For good cause shown, the board may grant a hearing even though demand is not made within such 20-day period. (emphasis added)

§281.48. Informal Disposition of a Contested Case.

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- (b) Any proposed consent order shall be presented to the board for its review. At the conclusion of its review, the board shall approve or disapprove the proposed consent order. Should the board approve the proposed consent order, the appropriate notations shall be made in minutes of the board and the proposed consent order shall be entered as an official action of the board. Should the board disapprove the proposed consent order, the licensee and charges that are the subject of such proposed consent order shall be scheduled for public hearing before the board at a subsequent disciplinary hearing. (emphasis added)

The fact that the pharmacy rules are silent with regard to proposals for decision, and that the rules require hearings "before the board," supports the conclusion that a proposal for decision is not a prerequisite to the Board's decision. The language in the Board of Pharmacy rules giving the Board discretion to "hold a hearing" as well as the language requiring a "public hearing before the board" prevails over the terms of the language in the SOAH Rules regarding the issuance of a proposal for decision.

The Board often confronts cases involving a pharmacist accused of illegally diverting controlled substances. In such cases, the Board may revoke a license on an imminent-peril basis, making the order immediately final and appealable. If the Board must wait for an ALJ to submit a proposal for decision, and wait for exceptions and replies to the proposal, a serious threat to the public health and welfare could result.

In summary, TSBP believes that it may hear cases and render a decision without waiting for an ALJ to render a proposal for decision, because:

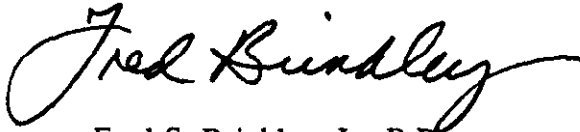
- (1) APTRA states that a proposal for decision is required only when a majority of Board members do not hear the evidence;
- (2) The language of SB 884 is permissive, not mandatory; and
- (3) the Board of Pharmacy rules require hearings "before the Board."

We respectfully request a written analysis supporting the Attorney General's opinion. In addition, please indicate whether your opinion would change if the Board promulgated a specific rule allowing it to take action without a proposal for decision.

Dan Morales  
June 4, 1992  
Page 5

Since time is of the essence, we would appreciate a prompt response to our request.

Sincerely,

A handwritten signature in cursive script, reading "Fred Brinkley".

Fred S. Brinkley, Jr., R.Ph.  
Executive Director/Secretary

FSB:dp

cc: Steve Martin  
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